been suggested by previous writers in the REGISTER on the subject in hand.

These hardships grow out of giving color of title and constructive possession to the wrongful claimant. We have seen what is believed to be the common law origin of this, and the common law reasons therefor; and how firmly embedded in our jurisprudence is this rule—so firmly embedded, indeed, that nothing short of legislative enactment can remove it. At the same time it must be admitted that the common law reasons for this rule have, in a great degree, if not entirely, been removed in modern times. Indeed, this common law rule may be said to be antagonistic to the policy of our law of the present day, as exemplified in our registry system.

Application to the legislature for the enactment of a statute abolishing the rule as to color of title and taking away its benefits from wrongful claimants, so that our records will show the exact condition of the title of each land-owner, except where the land is in the *pedis positio*, or to the extent that it is in the *pedis positio*, of an adverse claimant, is believed to be the true remedy for the hardships complained of.

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THE EXTENSION OF LOANS SECURED BY DEED OF TRUST.

The following reflections upon the subject of the extension of loans secured by deed of trust grow out of a case met with in ordinary practice.

Although intended to cover in a general manner the subject treated, there will be no attempt at exhaustive treatment; but simply a discussion of such points as arose in the case referred to which are believed to be of interest.

The following facts are assumed as attending upon any case likely to arise which will involve the points here discussed, to-wit, a loan of a fixed sum, say three thousand dollars, for a stated period, say three years; a deed of trust to secure the notes which represent the principal and interest of said loan, authorizing the trustee to sell in the event of default being made in the payment of any of the notes secured in the deed; and finally, an agreement to extend the loan for a further period of three years entered into prior to the maturity of the principal note.

We suppose that the original notes representing interest, which fell due, though not *eo nomine*, every six months, were paid at maturity. It is not necessary to the discussion to suppose that a new set of interest notes were signed and delivered when the loan was extended; but since that was true in the actual case let us suppose that it was done here also. Under these circumstances default is made in the payment of one of the installments of interest, say in the third of the new interest notes, and the question is as to the remedy. Naturally we turn to the contract for extension to find what its provisions are, and thus develop the first point of the case. That contract made no special provision for, and contained no reference to, a possible default in the payment of interest. The contract was in fact by parol; and amounted to nothing more than an agreeement to extend the loan for three years upon new interest notes being given, falling due every six months as before, without any new stipulations or conditions to meet the changed status of the loan.

It being competent to the parties to contract for an extension, it was, of course, also competent to them to provide the terms and conditions upon which that extension was to be made, and the remedies in the event of failure to comply with such terms.

But default having been made in the payment of interest, and the contract for extension offering no remedy, the creditor must turn to the deed of trust to determine the legal effect of his contract for extension upon its terms and provisions, and find his remedy there if he is to have a remedy at all.

Considering, then, the nature and effect of such a contract we find in the first place that to "extend" means "to prolong," "to protract," "to continue, as time," "to lengthen, as to extend the time of payment;" see Webster. To extend a loan, therefore, means to extend the time of payment of the loan and nothing more. It cannot mean to make a new contract, or a new loan; it extends or lengthens the time of payment of the old loan, the terms of which remain unchanged in all other respects so far as consistent with the new circumstances and with the contract for extension. No new note is given for the principal, for that would constitute a "renewal" and not an "extension." The evidence of debt and the security remain the same, except that the right to demand payment, and to foreclose in case of default, is suspended in accordance with the conditions and limitations of the contract. In the second place we find that the extension of the time of payment, supposing, of course, that the contract is valid and

binding in other respects, has the effect in equity of modifying the original condition of the mortgage to the same extent as if the terms of the new agreement were incorporated into the condition. 2 Jones on Mortgages (4th ed.), sec. 1190.

It is possible, of course, that the deed may provide for foreclosure in the event of default in the payment of any installment of interest, *eo nomine;* and may set out the terms and conditions of sale in such a contingency. And it is supposed that the terms may be broad enough to authorize a sale notwithstanding the fact that the installment of interest defaulted in is one of the new installments accruing under the loan as extended, or one of the new interest notes, if such notes were given. In such a case no difficulty would arise except as regards the equities of junior lienors, who, even if they could not insist that the new interest was not secured under the deed might, at least, contend that it was postponed to their liens.

This question cannot be discussed here, although it is believed that the most that could be claimed for such junior liens would be that they were preferred to the new interest. But such a case as the one supposed is not likely to occur. It is far more probable that reference to the deed of trust would discover the fact that it was to secure certain particularly described notes of given dates and amounts.

There, as in the case suggesting this investigation, the trustee would be empowered to sell, not "in the event of a default in the payment of any installment of interest," but "in the event of default in the payment of either of the above mentioned (or above described) notes."

The new interest note upon which default actually was made would likely enough correspond in amount with some of the "above mentioned notes," but it would differ as to date, and perhaps in other respects also. It would not in fact be one of them.

How, then, could the trustee sell?

The default provided for in the deed must happen before a sale can be had. 2 Jones on Mort. (4th ed.) 1174.

It would seem clear that the trustee may be enjoined in such a case from selling for the interest note, or because of the default in the interest installment, unless other authority for it can be suggested. The trustee derives his power and authority wholly from the deed, and he cannot waive any of its requirements or conditions. Nor can he alter its terms. A deed of trust is in law to all intents and purposes nothing more than a mortgage with a power of sale, which power must not

only be expressly conferred, but must also be executed in the manner prescribed. 28 Am. & Eng. Ency. L. 221 and 226.

Nor would recourse to the courts be of assistance. For, although it is true that a power of sale clause does not oust the court of its jurisdiction, it is also true that the court is itself strictly bound by the terms of the deed. 2 Jones on Mort. 1174; 8 Am. & Eng. Ency. L. 277–278; *Crenshaw* v. *Seigfried*, 24 Gratt. 272.

In conformity with the foregoing it is insisted, as being also law, that if a mortgage contains no provision for foreclosure upon the non-payment of interest, even though given for the security of the payment of a note with interest, a foreclosure cannot be had until the principal sum becomes due. 8 Am. & Eng. Ency. L. 189, note 1; *Brodribb* v. *Tibbets*, 58 Cal. 6; and *Naltner* v. *Tappey*, 55 Ind. 111.

It would therefore follow in the case of a loan secured by deed of trust being extended for three years, without a provision for foreclosure upon default in the installments of interest, to accrue during the extended period, being contained either in the agreement for extension or in the original deed, that no foreclosure could be had until the expiration of the extended period, notwithstanding continued and repeated default in interest.

This is so serious a result as to induce earnest effort to find some escape from the conclusion. We do not believe, however, there is any other conclusion that can properly be arrived at. We believe it to be well settled that the time of payment of a sealed contract may be extended by parol agreement. 2 Jones on Mortgages, 1179, 1190 and 1191; 8 Am. & Eng. Ency. L. 190, note 1; Saxton, 280; and 53 Vermont, 92.

Many authorities declare that a good consideration is necessary to make such a contract binding. But it is not believed that a new consideration would be necessary. *Burt* v. *Saxton*, 1 Hun. (N. Y.) 551.

It must be observed, however, that the contract is supposed to be a definite agreement to extend the loan for a stated period, as distinguished from a mere vague and indefinite forbearance. The latter might be, and indeed has been, set aside. But the former, supposed to be a binding contract, must be enforced.

In case of such default the creditor might sue upon his interest note, or for the interest, and having reduced his claim to judgment no reason is perceived why he might not get his money by execution if that be possible. But it is not supposed that a debtor out of whom money may be made by execution will usually permit the interest to

be defaulted upon; and this remedy is supposed to be more nominal than real.

As has been said, the deed may have provided in the first instance for a forfeiture of the principal upon default in the interest. But it is not likely that it will contain appropriate provisions. Indeed, its provisions may be to a contrary effect, as in the case now being considered. There the deed provides that "if any of the said notes *shall not have become due* and payable" when default occurred, "such part or parts of the said purchase money as will be sufficient shall be made payable at such time or times as the said remaining notes *will become due.*"

It is scarcely necessary to remark that such a contract, forbidding the calling in of the principal upon default in the interest, may be made by competent parties, and must be observed. 2 Jones on Mortgages, 1178.

On the other hand, we believe it to be sound law that, in the absence of a clause making the whole debt due on breach of a condition, the mortgage cannot be foreclosed for the whole amount. 8 Am. & Eng. Ency. L. 192, note "Failure to pay Interest;" 2 B. Mon. 202.

And, furthermore, we insist that although the payment of interest is a condition which the debtor must perform, its non-payment is not such a breach of the condition as makes the whole principal due. *Burt* v. *Saxton*, 1 Hun. (N. Y.) 551.

It is true that many decisions to a contrary effect may be found, though, happily, we believe, there are none in Virginia.

We say happily there are none in Virginia, because we think such decisions are unsound and ill-considered. They are founded, in our opinion, upon a misconception, and are, no doubt, largely due to efforts upon part of the courts to avoid what may appear to be a hardship. In fact, however, there is no hardship in the case. It is a simple question of contract; and if parties are careless enough to make contracts which fail to protect their interests properly it is certainly no business of a court to make new contracts by construction for them.

These decisions proceed upon the idea that the payment of interest is the condition upon which the loan is founded; and that this condition not being performed the contract may be declared at an end by the creditor, and a sale had for the principal, irrespective, or at least independent, of the provisions of the deed or contract. Such decisions are said to rely, and are supposed to rely, upon a *dictum* of Chancellor Sugden. This *dictum* is thus stated by Jones in his Treatise on

Mortgages, in section 1177: "Default in half-yearly interest at the times stipulated is held by high authority to give a right to foreclose immediately, though the principal sum is not due, and there is no provision making a forfeiture of the principal upon a default in the interest."

Notwithstanding the high authority of Chancellor Sugden's name, which is given to this doctrine, Jones himself seems to repudiate it, after discussing the subject at length, by saying, in section 1179, "The general rule, however, is that in the absence of any agreement that the whole debt shall be due upon failure to pay any installment of it, the mortgage cannot be foreclosed in equity until the last installment has become due." *Harshaw* v. *McKesson*, 66 N. C. 266.

The doctrine seems to us to be unsound, because it is opposed to the philosophy of the law relating to the general subject.

A mortgage is a mortgage, notwithstanding it does not contain a power of sale. Indeed, its object is merely security for the debt. Originally it did not contain the power of said clause, which is not an inherent part of a mortgage, but is a subsequent development or addition. The result of a default in the debt secured was not a sale, but was the passing of the property.

In the course of time the power of sale clause was added to the mortgage, and then came the interposition of the disinterested trustee who conducted the sale.

The power to sell, therefore, must always have been expressly given and strictly executed in the manner prescribed.

It is impossible to agree, then, to a doctrine which permits such a power to be implied. 27 Am. & Eng. Ency. L. 221, 226.

To permit a trustee to sell when the deed does not contain a power of sale is to imply that power. And to permit him to sell for the principal or interest in a contingency different from that contemplated in the deed is to permit him to depart from the terms and manner of sale prescribed. Whence comes his authority to do so? The chart of his powers and the fountain of his authority is the deed; and it is submitted that he usurps power if he seeks to draw to himself other authority than that which flows from that fountain-head. Surely then, upon principle, it must be held that a trustee cannot sell because of a default in interest unless the deed so provides; and surely he ought not to be permitted to sell for the principal when it is not due and when there is no clause providing that the whole debt shall be due upon a failure to pay interest.

A mere provision for the payment of interest semi-annually cannot by any possibility imply a right to forfeit the principal upon default in the interest, or a right to sell for the interest defaulted on. Competent parties may fail to protect themselves properly in this particular, just as they may in other particulars and in other contracts.

But in our opinion Chancellor Sugden never announced such a *dictum*, and never intended to do so, Jones and other high authorities to the contrary notwithstanding.

An examination of the case of *Burrowes* v. *Molloy*, 2 Jones & La-Touche, 521, in which the *dictum* is, makes it plain, we think, that the Chancellor was speaking with direct reference to the terms of the particular case before him, and had the provisions of the deed in that case in his mind. We do not think he intended making a remark of general application independently of those provisions. The deed in that case was subject to a provision with regard to paying interest which in effect expressly provides for a foreclosure in the event of default thereon. The parties thereupon made a second deed, reciting that they had not expressed their real intentions; that they intended the principal to remain outstanding until after the decease of the mortgagor.

The Lord Chancellor, under these circumstances, says in effect: If there was only this first deed to be considered a foreclosure might be had under its terms; but the second deed recites that the first does not correctly set forth the intention of the parties, and that their real intent was that there should not be a foreclosure until after the happening of a certain event and, therefore, none can be had until then. The mortgage in that case was in the old form and assigned the property "subject to a proviso, that if A should pay to B the sum of $900.01 on the 1st day of May, 1842, together with the interest thereon, *in the meantime*, at the rate of — *per cent. per annum, on every 1st* of May and 1st of November *in each year*, and should in the meantime pay the yearly rent, etc., etc., then the indenture and bond collateral therewith should be void." To make a similar provision in a deed of trust would be, we submit, to provide for a sale by the trustee upon default in the payment of interest; and, in fact, to provide also for the forfeiture of the principal and sale therefor upon that default.

The Lord Chancellor, after reciting the provisions of the mortgage, which he declared to be in the common form, and also the provisions of the deed of even date therewith, which declared the intention of

the parties to be that the principal sum should not be called for until after the decease of the mortgagor, and which contained a covenant to that effect on the part of the mortgagee, continued as follows: "Supposing that the principal sum had been made payable on a given day, no matter whether it was one year or twenty years after the date of the mortgage, with interest thereon half-yearly in the meantime, and that, before the day of payment of the principal money, default had been made in the payment of the interest thereon, the mortgagee would, at any time after that event, have had a right to file his bill for a foreclosure; because his right became absolute at law by the non-payment of the interest, the estate having been conveyed subject to a condition which had not been fulfilled."

It is confidently insisted that this language is intended to apply to conditions similar to those of the particular case before the chancellor, and is not intended to announce a doctrine following upon the simple securing of interest payable semi-annually. The ordinary mortgage then used, and the one before the chancellor, conveyed the property to the mortgagee; and the conveyance was absolute, except for the provision that if the principal and the interest were paid at the times agreed upon the indenture should be void.

If, therefore, the interest were not paid when due, the forfeiture followed as a matter of course. Not because the law implied any such thing on account of the mere falling due of interest semi-annually; but because the forfeiture was expressly contracted for, or as the chancellor says, "because his right became absolute at law by the non-payment of the interest, the estate having been conveyed subject to a condition which had not been fulfilled," to which we add that the condition was express. The chancellor's language, then, is scarcely a *dictum* at all. It simply declares the terms of a mortgage, such as the one recited, provide for a foreclosure.

It is equivalent to saying, "if a mortgage conveys property absolutely subject to the proviso that the conveyance shall be void if the mortgagor pays a named sum on a given day, together with interest thereon in the meantime on every first of May and first of November in each year, the conveyance is absolute if the interest is not paid, and a foreclosure may be had thereupon because it was so contracted."

It is plain that such a statement does not apply to a deed of trust which merely secures the principal and the semi-annual interest, without authorizing the trustee to sell for the interest in the event of a de-

fault thereon, or without providing for the calling in of the principal and a sale upon a default in the interest.

Power to do this must be contracted for and cannot be implied. The language of the chancellor referring to the deed of even date with the mortgage, which forbids the calling in of the principal during the life of the mortgagor, is interesting and instructive both as to the necessity of a contract in these particulars, and as to the effect of a contract to leave money outstanding until the expiration of a given period, or until the happening of a certain event, when unaccompanied by such provisions in the contract.

After saying that the mortgage as recited above authorized a foreclosure upon default in the interest, he continues: "But here the agreement was different . . . from the deed of covenant it appears that the real agreement between the parties was, that the principal sum should not be called in until after the decease of the mortgagor; and there is an actual covenant by the mortgagee" to that effect, "*which is not qualified by any stipulation respecting the payment of the interest in the meantime.*"

It will be seen that this covenant forbids the calling in of the principal sum for any cause during the lifetime of the mortgagor. It was an agreement to leave the money outstanding during that time without any provision for foreclosure in the event of a default in the payment of interest, and without providing for a forfeiture of the credit because of that default. It was in fact a negative form of the contract of extension which gave rise to this discussion. It provides that the principal shall not be called in until the happening of a certain event, whereas the contract of extension commented upon provides that the loan should be for a fixed period. Neither contract provided for foreclosure on account of default in interest.

The Chancellor says: "Interest was to be paid half-yearly upon the principal sum, . . . but the covenant is independent of everything contained in the deed of mortgage. . . . I do not see how any default in the payment of the interest, during the lifetime of the mortgagor, can enable the mortgagee to commit a breach of his covenant. It was said that this was like a case where, although the money was, by the proviso for redemption, to be paid at a fixed period, yet the mortgagee covenants that he will not call in the principal for a longer period, unless default should be made in the payment of the interest in the meantime; but the parties have not entered into such an arrangement. I think, therefore, that under these instruments the

plaintiff was not at liberty to file his bill for a foreclosure, as far as relates to the principal money ; and therefore cannot do so in respect of the interest which accrued before the principal sum became payable.''

It may be concluded, therefore, first, that the mortgage contract may be for a loan for a specified period, or until the happening of a certain event, and the creditor be without a remedy, so far as a foreclosure goes, until the expiration of the period or the happening of the event, notwithstanding semi-annual interest is stipulated for and default is made in its payment. Second, This may be so, either because there is an express contract that the principal shall not be called in during a specified time, without any stipulation or qualification respecting the payment of the interest in the meantime; or it may be so because there is an express agreement to lend a certain sum for a fixed period, without providing for a foreclosure or a forfeiture on account of default in the payment of interest in the meantime. In both cases there may be a provision calling for semi-annual interest without changing the result. The effect of the non-payment of interest upon the contract to lend must be provided for; or, at the least, the loan must be made expressly on the condition of remaining outstanding as long as or provided the interest is paid in the meantime and at the times stipulated. The case of *Burrowes* v. *Molloy* (*supra*), therefore, so far from furnishing authority for the doctrine that default in the half-yearly interest gives a right to foreclose immediately, though the principal sum is not due and there is no provision making a forfeiture of the principal upon a default in the interest, seems, when properly considered, to be clear authority the other way. Not only did the case provide for a forfeiture, but the so-called *dictum* of the chancellor makes it plain that he would have allowed the forfeiture had it not been for the explanatory deed, because the mortgage did provide for it.

And, the explanatory deed having provided that the principal should not be called in until after the happening of a certain event, the chancellor forbade a forfeiture, notwithstanding interest was to be paid half-yearly on the principal sum and there was a default, because the event had not happened, and there was no stipulation with respect to the payment of interest in the meantime qualifying that provision. The chancellor, moreover, refused to identify the case with an agreement on the part of the mortgagee not to call in the principal for a longer period than that originally contracted for *unless default* should be made in the payment of interest in the meantime, saying that the parties had not

entered into such an arrangement; that is to say there was no such provision in the deed.

Jones falls into a similar mistake in supposing that *Roddy* v. *Williams*, 3 Jones and LaTouche, 1, supports the so-called *dictum* doctrine of the Lord Chancellor. See Jones on Mortgages, sec. 1178.

That case does not announce the law as Jones states it. The case was one in which the deed assigned and conveyed to Roddy certain property subject to the proviso that the deed should be "void upon the payment on the 1st of August, 1845, of the principal with interest thereon at the rate of — per cent. per annum, by half-yearly payments on every 1st of February and 1st of August in every year."

There was contention that the interest was expressed to be payable on the 1st of August, 1845, and that no foreclosure could be had until then. The decision of the chancellor, in effect, held that, notwithstanding the *principal and interest* were expressed to be payable at the end of several years, it was yet apparent on the whole mortgage-deed that the agreement of the parties was that the interest should be paid half-yearly in the meantime.

It is true the decision allowed a foreclosure, but it was not allowed because it was apparent on the whole deed that the parties intended the interest to be paid half-yearly in the meantime, as Jones in section 1178, and, indeed, as the reporter of the case, seems to suppose.

All the chancellor said on the point was this: "The case is clear to this extent, that the mortgages originally made to the plaintiff were such that, in the events which have happened, they would, but for the deeds of 1840, have entitled the plaintiff to foreclose them. If, therefore, the plaintiff is deprived of the rights he acquired, and the remedies incident to those rights, under the mortgage deed, it must be in consequence of the deeds of 1840, which I am asked to declare void." The rest of the decision discusses these deeds of 1840, and holds them to be fraudulent and void.

Turning to the mortgage we not only find that a forfeiture is expressly provided for and a foreclosure admissible, because the conveyance was to be absolute if the interest was not paid "on every 1st of February, etc., in every year," but we also find this covenant, "and James Williams covenants that if at any time hereafter the interest on the principal sum, or any part thereof, should be behind or unpaid for the space of two months next after any of the days whereon the same ought to be paid, etc., etc., it shall be lawful for Roddy to sell and dispose of the mortgaged premises for such price as can be had

for the same, without the necessity of taking any proceedings at law or in equity to foreclose the mortgage."

We do not think it necessary to comment on the case further, as it is apparent that foreclosure was due, not to any implication by the law consequent upon the interest being payable semi-annually, but to the express contract between the parties. It is worth while, perhaps, to emphasize this inherent difference between the old-fashioned mortgage passed upon by Chancellor Sugden and the more modern deed of trust. In the former the mortgagor conveyed his property, not in trust, but in the form of an absolute conveyance, subject, however, to avoidance by the performance on his part of the conditions set out in the redemption clause.

These conditions invariably, we suppose, included the payment of the principal at a designated future time and the interest at fixed times *in each year in the meantime.* When, therefore, the Lord Chancellor speaks of the property "having been conveyed subject to a condition which had not been fulfilled" he has reference to the express condition of the mortgage, to-wit, that the conveyance shall be void only on condition that the interest is paid at the stipulated times in each year.

He does not by any means intend to convey the idea that the mere contract for interest payable semi-annually of itself creates a right to foreclose for the whole amount, when unaccompanied by the condition of the old mortgage, which in terms made the conveyance absolute unless the interest was so paid.

The old mortgage, then, in fact contained in its terms the direct provision for a forfeiture and consequent foreclosure which we have contended in this paper must be included in a deed of trust, or in a contract to extend a loan secured by deed of trust, if a foreclosure is to be had prior to the maturity of the principal sum. On principle, we think our contention is demonstrably clear; and although there are many decisions holding that a foreclosure may be had on default in the semi-annual interest, independently of a provision for forfeiture of the principal on that account, they will all be found, we believe, to rest upon the supposed *dictum* of Chancellor Sugden, which is thought, and said by them, to so decide.

This we think we have shown is a misconception of the chancellor's language; and in our opinion the law will forbid and the courts enjoin a sale, if attempted prior to the maturity of the principal (26 Am. & Eng. Ency. L. 972; 2 Jones on Mortgages, 1191; 53 Vt. 92), unless the

contract actually provides either for the foreclosure, or sale, as to interest, or for the forfeiture of the principal upon default being made in the payment of interest at the times stipulated.

These points, then, must be considered and provided for whenever a loan secured by deed of trust is to be executed. In such a case, moreover, the statutes of parol agreements and of registry must be kept in mind, and the contract reduced to writing and recorded if required to be so by those statutes.

It is believed that agents making loans very generally ignore the law in these particulars, and not only make parol contracts of extension without regard to them, but execute trust deeds in defiance of them.

It is not believed, however, that the practice could be justified as a custom of business, of which everyone is held to be cognizant, because it is supposed the custom must be held to be illegal.

The safe course is to reduce the contract to writing, though it may be by parol, and to specify what is to be done in case of default in the payment of interest both as regards forfeiting the principal and foreclosing for the interest.

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